



30 March 2022

Via FOIA Online

National Freedom of Information Officer
U.S. EPA, Region 3
1650 Arch Street (3RC70)
Philadelphia, PA 19103
(215) 814-2050

RE: Freedom of Information Act Request – EPA Region 3 Correspondence to WVDEP regarding WV/NPDES Permit WV1019121

To Whom It May Concern:

On behalf of the Sierra Club, I am writing to request that the United States Environmental Protection Agency (“EPA”) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the EPA regulations at 40 C.F.R. § 2.100, *et seq.*

The Sierra Club is the nation’s oldest environmental organization. It has more than 700,000 members nationwide and is dedicated to the protection and preservation of the natural and human environment. The Sierra Club’s Beyond Coal Campaign is dedicated to solving the pressing environmental and health problems associated with the mining, burning and disposal of coal and its combustion by-products.

Records Requested and Definitions

The Sierra Club is hereinafter referred to collectively as the “Requesting Party.” The Requesting Party ask that EPA provide the following records:

Any correspondence from EPA Region 3 to the West Virginia Department of Environmental Protection (“WVDEP”)—including but not limited to any general or specific objection—regarding the draft modification of WV/NPDES Permit WV1019121 circulated for public notice by the WVDEP on February 4, 2022.

For the purposes of this request, the term “records” means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports,

reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the EPA or any of its offices nationwide.

Exempt Records

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Requesting Party to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Requesting Party at the address listed below.

Fee Waiver Request

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). The Requesting Party has spent years promoting the public interest through the development of policies that protect human health and the environment, and have routinely received fee waivers under FOIA.

The Requesting Party is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, our organization intends to use the requested information to inform the public, so the public can meaningfully understand and participate in oversight of water pollution from coal mining.

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to EPA’s assessments and determinations regarding draft NPDES permits for coal mines. These determinations and the policies and procedures on which they are based are unquestionably “identifiable operations or activities of the government.” The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. There can be no question that this is such a case.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The Freedom of Information Act Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of your agency’s decisions because they are not otherwise in the public domain and are not accessible other than through a FOIA request. Given the pollution hazards associated with coal mines, it is important for information relating to government operations or activities involving the problem to be made available to the public. This information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency’s decision-making process with regard to the high hazard sites.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

As described above, the Requesting Party and its members have a longstanding interest and expertise in the subject of water pollution and NPDES permitting for coal mines. More importantly, the Requesting Party unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.” The Requesting Party intends to disseminate the information it receives through FOIA regarding these government operations and activities in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on the organizations’ websites, emailing and list-serve distribution to members.

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently little or no information publicly available regarding EPA’s oversight of NPDES permitting for coal mines. Absent disclosure of the records requested, the public’s

understanding will be shaped only by what is disclosed by the private interests involved. The records requested will contribute to the public understanding of the government's role, or their "operations and activities" associated with this critically important information.

The disclosure of the requested records is also essential to public understanding of the impacts that water pollution from coal mines may have on their communities and homes and the broader environment, including but not limited to threats to human health and drinking water sources. After disclosure of these records, the public's understanding of this problem will be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Requesting Party has no commercial interest in the requested records. Nor does the Requesting Party have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. The Requesting Party is a tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of the Requesting Party's mission to inform the public on matters of vital importance to the environment and public health.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, the Requesting Party has no commercial interest in the requested records. Disclosure of this information is not "primarily" in the Requesting Party's commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest.

We respectfully request, because the public will be the primary beneficiary of this requested information, that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A). In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

Record Delivery

We request EPA, in responding to this request, to comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552, (a)(6)(A)(i); 40 C.F.R. § 2.104. Please produce the records above by sending them to me at the address listed

below. Please produce them on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.


Whenever possible, please provide records in electronic format to the email address peter.morgan@sierraclub.org.

If it is necessary to provide hard copies, please mail those records as soon as possible to:

Peter Morgan
Sierra Club
1536 Wynkoop St. Ste. 200
Denver, CO 80202

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (303) 454-3367 or by e-mail at peter.morgan@sierraclub.org.

Sincerely,



Peter Morgan
Senior Attorney
Sierra Club Environmental Law Program